A

TAJUDIN SALLEH

v.

PP

B

HIGH COURT SABAH & SARAWAK, KUCHING
HAMID SULTAN ABU BACKER JC
[CRIMINAL APPEAL NO: 41-17-2007-II]
6 SEPTEMBER 2007

C ***CRIMINAL LAW:*** *Penal Code - Section 354 - Assault or use of criminal force to a person with intent to outrage modesty - Appeal against conviction and sentence - Evidence of child witness - Competency and corroboration - Whether conviction unsafe - Substantial miscarriage of justice - Evidence Act 1950, ss. 118, 133A - Criminal Procedure Code,*
D *s. 422*

CRIMINAL PROCEDURE: *Trial - Competence of witness - Child witness - Corroboration - Evidence Act 1950, ss. 118, 133A - Criminal Procedure Code, s. 422*

E ***EVIDENCE:*** *Witness - Child witness - Competency - Corroboration - Evidence Act 1950, ss. 118, 133A - Criminal Procedure Code, s. 422*

This was an appeal by the appellant/accused against the decision of the learned magistrate convicting him under s. 354 of the Penal
F Code of assault or use of criminal force to a person with intent to outrage modesty, and sentencing him to 20 months' imprisonment. The respondent/prosecution also filed an appeal against the inadequacy of the sentence. The accused was 58 years old and the victim ('PW2') 10 years of age at the time of the
G incident. Evidence had been led to show that the appellant – at a school – called PW2, who had just come out of the toilet, over to the back of the library. When PW2 reached the place, the appellant used both his hands to take off PW3's underwear. He also threatened her not to tell any one else of what he had done
H to her. The victim's cousin ('PW3') gave evidence saying that she saw the accused confronting PW2 while his hand touched PW2's private parts. Although there appeared to be some inconsistency in respect of PW3's evidence, the learned magistrate held that this was a clear cut case whereby both the complainant, PW2, and
I the eyewitness, PW3, had positively identified the accused, whom they knew as the gardener working at their school. The accused's main complaint in this case was that the learned magistrate had

erred in law when he failed to examine whether PW2 and PW3 had sufficient appreciation of the solemnity of the occasion as required by law and practice. There was no evidence on record, on the facts of this case, to show that the learned magistrate had established the competency of the child witness to give evidence. The issue requiring determination was whether such omission was fatal.

Held (allowing the accused's appeal, and dismissing the prosecution's cross-appeal):

(1) It is for the prosecution to establish that the witness is competent and in the case of a child witness, the provisions of s. 133A of the Evidence Act 1950 ('Act') must ordinarily be satisfied as to competency as well as corroboration for the defence to be called, based on the maximum evaluation test. *Balachandran v. PP* (foll). This section must be read together with s. 118 of the Act, which sets out the principle rule regarding the competency of witnesses. Under s. 118 of the Act, when a child of tender years is called to give evidence, there is a duty upon the court to ensure that the child understands the nature of an oath. The evidence can be received without an oath if the court is of the opinion that the child possesses sufficient intelligence to justify the reception of the evidence and understands the duty of speaking the truth. Normally, a child does not have the temptation to take sides and speak falsehoods. But there is a danger in placing absolute reliance upon the evidence of a child witness as it can be easily influenced by adults who have interest in the case. Therefore, the evidence of a child witness must be taken with great caution. Although a child may be a competent witness, a closer scrutiny of its evidence is necessary before acceptance by the court. As a matter of strict law, a court can act on the uncorroborated testimony of a single child witness. But it is a sound rule in practice not to act on the uncorroborated evidence of a child. This is only a rule of prudence and not of law. This was the position under s. 118 of the Act but under s. 133A of the Act, corroboration is needed as a matter of law, as it is specifically stated that "unless that evidence is corroborated by some other material evidence in support thereof implicating him". In this case, there was a total failure on the part of the learned magistrate to comply with the provisions of s. 118 of the Act

A as well as s. 133A of the Act, thereby making the conviction in law unsafe. Such a failure could not be cured by s. 422 of the Criminal Procedure Code. There was a substantial miscarriage of justice as PW3's competency was not established in this case and it could not be patently said that
B there was "material evidence" to corroborate the evidence of PW3, as required under s. 133A of the EA. (para 9)

Case(s) referred to:
Arumugam Mothiyah v. PP [1995] 1 CLJ 58 HC ***(refd)***
C *Aziz Muhamad Din v. PP [1997] 1 CLJ Supp 523 HC* ***(refd)***
Balachandran v. PP [2005] 1 CLJ 85 FC ***(refd)***
Chao Chong & Crs v. PP [1960] 26 MLJ 238 ***(refd)***
Loo Chuan Huat v. PP [1971] 2 MLJ 167 ***(refd)***
PP v. Mohamad Terang Amit [1999] 5 CLJ 156 HC ***(refd)***
PP v. Mohd Noor Abdullah [1992] 1 CLJ 702; [1992] 3 CLJ (Rep) 404
D *HC* ***(refd)***
Rameshwar Kalyan Singh v. State of Rajasthan AIR [1952] SC 54 ***(refd)***
Sidek Ludan v. PP [1995] 3 MLJ 178 ***(refd)***
Tham Kai Yau & Ors v. PP [1977] 1 MLJ 174 ***(refd)***

Legislation referred to:
E Criminal Procedure Code, s. 422
Evidence Act 1950, ss. 8, 118, 133A, 157
Penal Code, s. 354

Other source(s) referred to:
F Augustine Paul, *Evidence Practice and Procedure,* p 1027

For the appellant/accused - Abdul Rahman Hj Mohmad Hazmi; M/s Abdul Rahman & Albert Litor
For the respondent/prosecution - Musli Ab Hamid DPP

G *Reported by Suresh Nathan*

JUDGMENT

H **Hamid Sultan Abu Backer JC:**

[1] The is my judgment in respect of the accused/appellant's appeal against conviction and sentence of the learned magistrate in relation to assault or use of criminal force to a person with intent to outrage modesty. The accused was 58 years old and the
I victim 10 years old at the time of the incident. The accused was convicted and sentenced to 20 months imprisonment. The respondent has also filed an appeal against inadequacy of sentence.

[2] The accused was charged as follows:

> Bahawa anda, pada 2.7.2004 lebih kurang.jam 11.40 pagi di Tangki Air Lama, di belakang Pusat Sumber bersebelahan Tandas di SK Senibong/Sejirin dalam daerah Lundu, di dalam Negeri Sarawak telah menggunakan kekerasan jenayah kepada Florence Rosita Ak Suring, seorang perempuan dengan niat mencabul kehormatan dengan menggunakan tangan untuk meraba Florence Rosita Ak Suring tersebut, maka kamu telah melakukan kesalahan yang boleh dihukum di bawah seksyen 354 Kanun Keseksaan.

[3] Section 354 of the Penal Code reads as:

> Whoever assaults or uses criminal force to any person, intending to outrage or knowing it to be likely that he will thereby outrage the modesty of that person, shall be punished with imprisonment for a term which may extend to ten years, or with fine, or with whipping, or with any two of such punishments.

[4] Evidence was led to show that the appellant called the victim to come over to the back of the library. At that material time the victim had just came out of the toilet which was behind the library. When the victim reached the place, the appellant had used both of his hand to take off the victim's underwear. The appellant has also threatened the victim not to tell any other people what he had done to her. There was another person, the victim's cousin, 14 years old who gave evidence to say that she saw the accused confronting the victim while his hand touched the private part of the complainant. There appears to be some inconsistency in respect of PW3's evidence. However, the learned magistrate in his grounds of judgment says:

> This is clear cut case whereby both of the complainant and the eye-witness had positively identified the accused whom they knew as "Tukang Kebun" working at their school.

[5] In this appeal, the appellant/accused appeals against conviction and sentence and the respondent/prosecution appeals against inadequacy of sentence. I think it is sufficient to deal with the appellant/accused's appeal in this case. The appellant/accused's petition of appeal *inter alia* reads as follows:

> (a) as against conviction
>
> (i) the trial proceeded on sworn testimonies of the victim - PW2 (Florence Rosita Ak Suring) and PW3 (Florence Rosita Ak Mejir when in fact the learned magistrate failed to follow the procedure in section 133A of the Evidence Act 1950 (EA

A 1950), in that the learned magistrate failed to examine whether the said PW2 and PW3 had sufficient appreciation of the solemnity of the occasion and the added responsibility to tell the truth, which is involved in taking the oath, over and above the duty to tell the truth which is an ordinary duty of normal, social conduct.

B

(ii) the learned magistrate had erred in law and in fact in overlooking and in failing to take into account or give proper weight to, or draw proper inference from the relevant matters, which otherwise might have caused him to come to a different conclusion. There are glaring inconsistencies in the testimony of PW2 and PW3 which could raise reasonable doubt in the prosecution's case.

C

(iii) the learned magistrate erred in law and in fact in failing to consider the failure of the prosecution to call for the class/ mathematics teacher, Cikgu Bong Mei Lin, when in fact the entire case depends on the credibility of PW2 and PW3 and the defence was put in an invidious position of being unable to rebut the allegation by PW2 and PW3.

D

(v) in the alternative, the learned magistrate erred in law and in fact in holding and accepting that there was evidence of outraging modesty without the production and admission of medical report when there is a need of independent corroboration in view of the discrepancy between the testimony of PW2 and PW3.

E

F

(vi) the evidence of opportunity to commit the offence and pointing to the guilt of the petitioner were inconclusive or otherwise not corroborated.

[6] It is trite that the appellate court will not interfere with the finding of facts of the trial court. However, in this case the appellant's main complaint is one of error of law in that the learned magistrate had failed to examine whether the victim PW2 and the witness PW3 had sufficient appreciation of the solemnity of the occasion as required by law and practice. On the facts of this case there is no evidence on record to show that the learned magistrate has established the competency of the child witness to give evidence. The issue for me to determine is whether such omission is fatal.

G

H

I

Appellant/Accused's Submission

[7] The appellant in support of his contention *inter alia* submits as follows:

(a) there must be a preliminary examination of the child witness, PW2 and PW3, and relies on the case of *Sidek bin Ludan v. Public Prosecutor* [1995] 3 MLJ 178 where it was held:

> In must be borne in mind that an infant of any age may be sworn as a witness in any criminal case, provided that such infant appears sufficiently to understand the nature and moral obligation of an oath or understands the duty of speaking the truth. In my judgment, competency depends not upon its age, but upon its understanding. ... The competency of any child (child witness included) to testify as a witness is a condition precedent to the administration of an oath or affirmation, and clearly, it is a question distinct from that of his credibility when he has been sworn or affirmed. In determining the question of competency, the court acting under s. 118 of the Act, is entitled to test the capacity of a witness by putting proper questions. The court has to ascertain the intellectual capacity and understanding of the witness (child witness included) to give a rational account of what he has seen or heard or done on a particular occasion.

(b) there is an obligation on the learned magistrate to conduct a preliminary examination to ascertain the child's capacity to understand and give rational answers. In *Sidek*'s case *(supra)*, the court dismissing the appeal held that:

> (1) The trial court had embarked on preliminary examinations of the child witnesses as required under s. 133A of the Evidence Act 1950 ('the Act') and rightly concluded that they understood the nature of the oaths administered to them. An infant of any age may be sworn as a witness in any criminal case, provided that such infant appears sufficiently to understand the nature and moral obligation of an oath or understands the duty of speaking the truth. Consequently, the child witnesses were allowed to give sworn testimonies before the trial court as competency depends not upon the child witness' age, but upon his or her understanding.

A In this case this was not done and the prosecuting officer advised PW2 that she must testify the truth, only after the oath was taken. Further, PW3 gave evidence immediately after taking the oath. That part of the evidence in the notes of proceedings reads as follows:

B

P.O: Call 2nd witness.

PW2 (Florence Rosita Ak Suring)

Oath state and affirms in Bahasa Malaysia

C

Examination-in-chief

P.O: Advise the witness, she must testify the truth.

Berapa umur adik

D 12 thn …

At Page 15 (Notes of Proceedings)

P.O: Call prosecution third witness.

PAULINE AK MEJIR

E

Oath state and affirms in Bahasa Malaysia

Examination-in-chief

P.O: Berapa umur.

F

14 tahun. Masih sekolah di smk Lundu … .

In this case there does not seem to be any record of any appropriate questions so as to ascertain whether the child witnesses understood the solemn duty of speaking the truth. G In *Sidek*'s case *(supra)*, the following statement by the trial court was found in the notes of proceedings and reads as follows:

> Mahkamah menyoal saksi untuk mempastikan jika beliau memahami sifat keterangan bersumpah. Saksi diingatkan beliau harus bercakap benar dan saksi berkata beliau faham atas maksud sumpah iaitu mesti mengikut apa yang dikatakan dalam sumpah dan dalam keadaan ini untuk bercakap benar. Oleh kerana pada pendapat mahkamah saksi ini faham akan sifat bersumpah (oath) maka saksi ini boleh mengangkat sumpah untuk beri keterangan.

H

I

Further, in *Arumugam a/l Mothiyah v. Public Prosecutor* [1995] 1 CLJ 58, it was held that:

> [3] It is desirable that the Sessions Court Judge should apply and record appropriate questions in the notes of evidence so as to ascertain whether the complainant understood the solemn duty of speaking the truth or not. The Sessions Court Judge should also record his opinion and reasons in arriving at the conclusions as to whether the complainant understood the solemn duty of speaking the truth or not.

(c) the learned magistrate wrongfully relied on the case of *Loo Chuan Huat v. Public Prosecutor* [1971] 2 MLJ 167 as this was a case before the coming into force of s. 133A EA 1950. The principle and scope of s. 133A EA 1950 is explained in *Sidek*'s case *(supra)* as follows:

> The pre-1971 position in Malaysia in regard to the evidence of a child witness whether sworn or unsworn is placed on the same footing as that of an accomplice. In simple terms, this means that the rule of prudence on the necessity of warning the jury or, for that matter, the court on the dangers of convicting on the uncorroborated evidence of a child applies equally to sworn or unsworn testimony (*Loo Chuan Huat v. PP* [1971] 2 MLJ 167). But in 1971 by the introduction of the new s. 133A of the Evidence Act 1950 ('the Act') the law in Malaysia in so far as it relates to the evidence of a child witness was amended and that new section reads as follows:
>
> > Where, in any proceedings against any person for any offence, any child of tender years called as a witness does not in the opinion of the court understand the nature of an oath, his evidence may be received, though not given upon oath, if, in the opinion of the court, he is possessed of sufficient intelligence to justify the reception of the evidence, and understands the duty of speaking the truth; and his evidence, though not given on oath, but otherwise taken and reduced into writing in accordance with section 269 of the Criminal Procedure Code of the Federated Malay States shall be deemed to be a deposition within the meaning of that section:
> >
> > > Provided that, where evidence admitted by virtue of this section is given on behalf of the prosecution, the accused shall not be liable to be convicted of the offence unless that evidence is corroborated by some other material evidence in support thereof implicating him.

> The effect of this amendment is far reaching. The proviso to s. 133A of the act in simple terms means this: A conviction cannot stand on the uncorroborated evidence of an unsworn child witness. It is insufficient for the trial court to merely administer a warning on the dangers of so convicting as the amendment now makes it a rule of law, more explicitly, that the evidence of an unsworn child witness shall be corroborated (*PP v. Mohd Noor bin Abdullah* [1992] 1 CLJ 702). This amendment distinguishes between the testimony of a sworn and unsworn child witness. In the case of a sworn child witness the old rule of prudence applies, *viz.* the need to give an exhaustive warning on the dangers of convicting on such uncorroborated evidence. Where as in the case of an unsworn child witness, s. 133A of the Act applies.

(d) there was absence of corroboration. The learned magistrate failed to take into account or give proper weight to, or draw proper inference from the fact that PW2 had only reported the matter to her mother, PW1, six (6) days after the incident. In the present case there was no reason given by the prosecution as to why there was a delay for PW2 to tell PW1 of the alleged incident. The report was not spontaneous nor made at the earliest opportunity. The learned magistrate ought to have made a finding that there was no corroboration in this allegation of PW2. In *Arumugam*'s case *(supra)*, it was said:

> There is a marked absence of corroboration in this appeal. The complainant refused to reveal the identity of the rapist to her guardian. There were ample opportunities for the complainant to expose the rapist but she took her own sweet time. She only started to spill the worms out of the cans, so to speak, when her menstrual periods went haywire. In my judgment, there was no corroboration on the allegation of rape.

In *Public Prosecutor v. Mohamad Terang bin Amit* [1999] 1 MLJ 154, it was held:

> (2) In view of the delay by PW7 and PW8 in informing their mothers of the alleged incidents, it could not be said that they had informed their mothers upon the 'first reasonable opportunity' or 'as speedily as could reasonably be expected'. Therefore, their evidence must be precluded as capable of corroborating the evidence of PW7 and PW8.

(e) the statement to the victim's mother, PW1 cannot be received under s. 157 for purpose of corroboration. In *Aziz Muhamad Din v. Public Prosecutor* [1997] 1 CLJ Supp 523, the court opined:

> In the upshot a statement tendered admissible by s. 157 cannot be treated as corroboration of evidence given by the maker of the statement in instances falling within the meaning of s. 73A(7). Section 73A(7) has restated the law of corroboration in full glory as originally formulated in *R v. Baskerville* and has demolished the uneasiness that surrounded s. 157. This view is anchored on the foundation laid in *PP v. Chee Kon Fatt* [1991] 3 CLJ 2564 by Edgar Joseph Jr J (as he then was) where his Lordship said at p. 2565:
>
> > The only evidence in the case for the prosecution as to this alleged fact was the uncorroborated testimony of Chattavelu and, although it was said that he gave his version of the facts as deposed to in this court, to his superior Chief Inspector Suleiman and to the Investigation Officer DSP Yeap Hooi Pin, within a short while after the arrest of the accused, nowhere in his police report made in writing on that day at 8.15pm did he mention the fact that he had seen the box on the petrol tank of the motorcycle seated astride which was the accused nor was any explanation vouchsafed to this Court for this glaring omission. In any event, repetition is not corroboration in the true sense within the meaning of *R v. Baskerville* [1916] 2 KB 658. This proposition has received statutory recognition in s. 73A Evidence Act [Revised] 1974 … (emphasis added)
>
> It therefore follows that the evidence of SP1 and exh. P1 based on the statement made by SP2 is incapable of amounting to corroborative evidence. Exhibit P1 cannot be treated as corroboration of the evidence of SP1. The oral evidence of SP1 cannot be treated as corroboration of the evidence of SP2.

(f) the words uttered by PW2 to her mother do not amount to complaint. In *Aziz Muhamad Din (supra)*, the court observed:

> On the manner in which a complaint should be made I refer to the admirable book *The Law of Evidence*, Vol. 1 by E.R.S.R. Coomaraswamy where the learned author says at pp. 240-241:

> The complaint must be voluntary and spontaneous, not elicited by leading, inducing or intimidating questions. If the circumstances indicate that, but for the questioning, there would probably have been no voluntary complaint, the answers are inadmissible. For example, "Did X assault you? Did he say this to you?" would make the answers inadmissible. But if the questions merely anticipate a statement which the complainant was about to make, the fact that the questioner spoke first is immaterial; for example, 'What is the matter? Why do you look worried?' would not render the answer inadmissible. The question is one for the discretion of the Judge.

Further, PW1 had stated and reflected in the notes of proceedings as follows:

> Pada waktu itu saya tidak tahu tapi mengetahuinya kemudian selepas itu diberitahu sendiri oleh anak saya. Saya tanya banyak kali untuk confirm dan dia cakap memang terjadi.

From the above statement of PW1, it is clear that when PW2 said that she told her mother, PW1 of the incident on some other day, she in fact had only related the incident after repeated questioning by PW1 after which PW1 made the police report (exh. P1). Therefore her statement to PW1 is not a complaint (within s. 8 of the EA 1950) as it was not made voluntarily and spontaneously.

(g) there are two versions in the evidence led by the prosecution. One is that PW2 told the court that she saw PW3 after the appellant had left the scene of the incident and the other is that PW3 saw part of the alleged incident. PW2 as per the notes of proceedings said as follows:

> Pada masa lelaki meraba kemaluan kamu, adakah kamu nampak sesiapa berada di kawasan tersebut?
>
> Tidak ada.
>
> Bagaimana dengan selepas dia berhenti meraba kamu, ada kamu nampak sesiapa?
>
> Ada. Saya nampak Pauline (F) Ak Mejar.
>
> Kamu nampak Pauline di bahagian mana?
>
> Dia berada di kawasan berdekatan dengan tandas.

And PW2 said (at page 12 of the Appeal Record):

Semasa kamu nampak Pauline, adakah orang tua itu masih bersama kamu atau dia sudah pergi?

Masa saya nampak Pauline, orang tua itu sudah jalan.

Whereas PW3 said:

Saya nampak Pakcik Tajuddin buka seluar Florence.

Saya nampak tangan pakcik tadi menyentuh kemaluan Florence.

Setelah kamu nampak macam ini apa kamu buat?

Saya terus lari sebab terkejut dan rasa takut.

And PW3 said (at page 18 of the Appeal Record):

Accused: I put it to you that I never committed those act?

PW3: Saya nampak sedikit sahaja yang dibuka. Mungkin selepas saya lari.

In view of the discrepancies, it will only be prudent for the learned magistrate to seek for independent corroborating evidence before calling the defence.

Respondent/Prosecution's Submission

[8] The respondent in opposing the appellant's appeal and seeking increase in sentence *inter alia* submits as follows:

(a) the learned magistrate had followed section 133A of the EA 1950 to ascertain whether the witnesses (PW2) and (PW3) had possessed sufficient intelligence to justify the reception of evidence. Although there was no special examination conducted by the learned magistrate to ascertain this matter, it can be inferred from the way the witnesses answered the introductory question by the prosecuting officer. More than that, the prosecuting officer himself had ascertained the compliance of section 133A of the EA 1950 by advising the witnesses of their duty to testify the truth. Furthermore, the learned magistrate himself had clearly stated in his judgment "With regard to the evidence of the complainant who is a child (13 years old) at the time of trial, the court argues that the child is a competent witness under Section 133A of the Evidence Act 1950". It was a settled law in this country, the appellate should not interfere the finding of facts of the trial court. (b) there was no serious inconsistency in the evidence adduced from PW2 and PW3 to infer any reasonable doubt in the prosecution's case. (c) the testimony from PW2 and PW3 were sufficient to prove the case against the appellant. From the record

of appeal, the evidence adduced from PW2 had been corroborated by PW3. PW3 was the eye witness in the present case. She was at the crime scene at the time the offence was committed by the appellant during the offence committed by the appellant. The evidence adduced from PW3 was a direct evidence which has strong value. (d) section 134 of the EA 1950 clearly stated that, "No particular number of witnesses shall in any case be required for proof of any facts" His Lordship Augustine Paul in the case of *Aziz bin Mohamad Din v. Public Prosecutor* [1996] 5 MLJ 473 held that: "evidence has to be weighed and not counted". (e) in view of the evidence adduced by the prosecution, the conviction of the appellant was not wrong in law. Prima facie case has been established by the prosecution and the appellant himself elected to remain silent. (f) as regard to the sentence passed by the learned magistrate, the sentence passed was inadequate in view of the rampancy of sexual offence.

[9] I have read the appeal record and the submissions of the parties in detail. I take the view that the appeal must be allowed and my reasons are as follows:

(a) It is for the prosecution to establish that the witness is competent and in case of child witness, the provisions of s. 133A of EA 1950 must ordinarily be satisfied as to competency as well as corroboration for the defence to be called, based on maximum evaluation test as expounded by *Balachandran v. PP* [2005] 1 CLJ 85.

(b) Section 118 of EA 1950 sets out the principle rule regarding the competency of witness. Under this section all persons are competent, provided he satisfies the test of being able to understand the questions which are put to him, and he is in a position to give rational answers to those questions. Those who will not be competent are such persons whom the court considers incapable of understanding questions or giving rationale answers to them on account of tender years, extreme age, disease of mind or body or for any other cause of the same kind. Even a lunatic is not declared to be incompetent unless his lunacy prevents him from understanding or answering questions. The court under this section has wide discretion to examine the intellectual capacity and the understanding of witnesses who are children of tender years. Under this section even a child is competent to testify if he understands the questions put to him and give rationale answers thereto. Competency is not tested on the basis of age

of a person but only on the basis of capacity to understand. No precise age limit can be given as persons of the same age differ in mental growth and their ability to understand the question and give rationale answers. In practice, it is not unusual to receive the testimony of children of eight or nine years old when they appear to possess sufficient understanding. Section 118 reads as follows:

> All persons shall be competent to testify unless the court considers that they are prevented from understanding the questions put to them or from giving rationale answers to those questions by tender years, extreme old age, disease, whether of body or mind, or any other cause of the same kind.

Under this section it is for the court to decide whether a child or anybody is a competent witness or whether the witness has intellectual competency. The competency or incompetency of a witness is usually decided by the trial judge on a preliminary examination of the witness called *'voire dire'*. In the case of a child witness, it should have that capacity to understand the difference between truth and falsehood. This is tested by the judge by putting simple questions like, 'what is your name?' 'Where do you live?' 'What day of the week is today?' etc. The object of putting questions on *'voire dire'* before actual examination of that witness is to ensure that the time of the court is not wasted, if it is subsequently found that the child is not intelligent enough to give evidence. If the child answers the questions satisfactorily, the judge will certify that the child is a competent witness. (See *Sidek bin Ludan v. PP* [1995] 3 MLJ 178; *Rameshwar Kalyan Singh v. State of Rajasthan* AIR [1952] SC 54).

(c) The position in England is succinctly set out by the learned author, Datuk Augustine Paul FCJ in the book titled *"Evidence Practice and Procedure"* at p. 1027 as follows:

> In England, prior to 1933, children could testify in criminal proceedings only if they were found competent to swear the same oath as adult witnesses. Section 38 of the English Act first introduced the principle of unsworn evidence in criminal cases.
>
> In *R v. Hayes* [1977] 64 Cr App R 194, Hayes was charged with inciting three boys to commit acts of gross indecency with him, and also with committing an act of

gross indecency with one of them. The boys were called as witnesses and the two older boys, aged 11 and 12, were sworn after being examined by the judge. The judge's questions during his examination were to a large extent concerned with the boys' religious understanding, but it was clear that the oldest boy, in particular, had little if any religious belief. The appellant claimed that the boy should not have been sworn in those circumstances, but the Court of Appeal upheld the trial judge's decision. Bride LJ said at 196:

> It is unrealistic not to recognize that, in the present state of society, amongst the adult population the divine sanction of an oath is probably not generally recognized. *The important consideration we think, when a judge has to decide whether a child should properly be sworn, is whether the child has a sufficient appreciation of the solemnity of the occasion and the added responsibility to tell the truth, which is involved in taking an oath, over and above the duty to tell the truth which is an ordinary duty of normal, social conduct.* (emphasis added.)

As was observed by Andrews & Hirst in *Criminal Evidence* (3rd Ed, 1997):

> The competence of a child could never be presumed. Even for the purpose of giving unsworn testimony, it was still necessary to establish by positive means that the child understood the ordinary duty of telling the truth. It was the duty of a court or judge to determine competence and the proper level of competence before proceeding to admit evidence from a child. This could involve the child being asked questions by the trial judge, and it could also involve the calling of expert opinion evidence from child psychologists. If a child was allowed to testify without such prior examination, any conviction based on that child's evidence was liable to be quashed on the ground of material irregularity (*R v. Khan* [1981] 73 Cr App R 190).

(d) Section 133A of EA 1950 which deals with evidence of child of tender age was introduced in 1971 by PU(A) 126/171. Such a provision is not found in India or in England. To that extent, our law on child evidence has taken a different approach, and the Indian or English cases cannot stand as an authority to interpret the mandatory provision of our statute. This section must be read together with s. 118 which makes

all witness competent witness and makes reference to a person of tender years. Under this section, when a child of tender years is called to give evidence, there is a duty upon the court to ensure that the child understands the nature of an oath. The evidence can be received without an oath if the court is of the opinion that the child possesses sufficient intelligence to justify the reception of the evidence, and understands the duty of speaking the truth. Section 133A of the EA 1950 states:

> Where, in any proceedings against any person for any offence, any child of tender years called as a witness does not in the opinion of the court understand the nature of an oath, his evidence may be received, though not given upon oath, if, in the opinion of the court, he is possessed of sufficient intelligence to justify the reception of the evidence, and understand the duty of speaking the truth; and his evidence, though not given on oath, but otherwise taken and reduced into writing in accordance with section 269 of the Criminal Procedure Code of the Federated Malay States shall be deemed to be a deposition within the meaning of that section:
>
> Provided that, where evidence admitted by virtue of this section is given on behalf of the prosecution, the accused shall not be liable to be convicted of the offence unless that evidence is corroborated by some other material evidence in support thereof implicating him.

Under this section, the child's evidence must be corroborated or there must be some other evidence implicating the accused before he can be convicted. In *Tham Kai Yau & Ors v. PP* [1977] 1 MLJ 174. HRH Raja AzIan Shah FJ (as HRH then was) observed:

> the appeal was brought on several grounds. We did not intend to deal with all of them as we felt there was not much substance in them. We needed to consider only two. One of them was that the jury were not given due warning against accepting the evidence of PW8 who was 13 years of age at the time of the incident and 14 when he gave evidence, without corroboration. In cases involving child evidence of tender years, we are of the opinion that it would not be necessary to give a formal warning that it is dangerous to convict on the uncorroborated evidence of a child of tender years. It is sufficient if the judge adopts the prudent course of advising the jury to pay particular attention to or to scrutinise with special care, the evidence of young

A children and explains the tendencies of children to invent and distort. The objection in such a case as this, is not on the grounds of complicity, as in the case of an accomplice, or on the grounds of an oath against an oath, as in the case of a prosecutrix in a sexual offence against her, but on the ground of tendency of a child of tender years to confuse fantasy with reality: see *Loo Chuan Huat v. Public Prosecutor*.

In the present case, however, the learned judge did not consider PW8, a child of' tender years and he was satisfied that he possessed sufficient intelligence to understand the meaning and significance of an oath. The absence of such warning therefore was not fatal as there was in fact substantial corroboration of the boy's evidence. The appeal on this ground, we thought, must therefore fail.

In *Chao Chong & Crs v. PP* [1960] 26 MLJ 238, Thomson CJ observed:

Again in our view, the direction though not inaccurate was inadequate. One reason why children's evidence is regarded with suspicion is that there is always the danger that a child may not fully understand the effect of taking an oath. In this country where evidence is taken on affirmation that consideration loses much of' its force. Another reason, however, which in this country possesses undiminished force is that it is a matter of common knowledge that children at times find it difficult to distinguish between reality and fantasy. They find it difficult after a lapse of time to distinguish between the results of' observation and the results of imagination. In our view something of the sort should have been put to the jury. At the very lowest they should have been invited to consider their own experience in connection with stories told by children. It was not sufficient merely to observe that there is a risk in acting on the uncorroborated evidence of a child. In any event we have grave doubts as to whether even so far as it goes that observation is strong enough. As was said by Lord Goddard in the case of *Mohamed Sugal Esa v. The King*:

It is a sound rule in practice not to act on the uncorroborated evidence of a child, whether sworn or unsworn, but this is a rule of prudence and not of law.

In *Sidek bin Ludan v. PP* [1995] 3 MLJ 178, the court stated that the trial court had embarked on preliminary examinations of the child witnesses as required under s. 133A of the EA 1950 and rightly concluded that they understood the nature

of the oaths administered to them. An infant of any age may be sworn as a witness in any criminal case, provided that such infant appears sufficiently to understand the nature and moral obligation of an oath or understands the duty of speaking the truth. Consequently, the child witnesses were allowed to give sworn testimonies before the trial court as competency depends not upon the child witness' age, but upon his or her understanding. In determining competency, there is no need in law for a *voire dire* though it may be prudent. The competency of a witness can be ascertained without having to undergo a *voire dire*, unlike the issue of the voluntariness of an accused's cautioned statement, which if challenged, should proceed by way of a *voire dire*. In the case of a sworn child witness, there is a need to give an exhaustive warning on the dangers of convicting on such uncorroborated evidence. Further, the court in *Sidek*'s case *(supra)* stated that the trial court rightly treated the evidence of the child witnesses with utmost caution and proceeded to apply and warn itself of the rule that their sworn evidence must be corroborated by evidence which can reasonably confirm the truthfulness of the child's testimony.

In *PP v. Mohd Noor bin Abdullah* [1992] 1 CLJ 702; [1992] 3 CLJ (Rep) 404 KC Vohrah J observed:

> The learned judge made her decision after having reserved her judgment and it is clear from the grounds of her decision that she had carefully reviewed all available evidence. The sworn evidence as to rape was that of a young girl of some 14 years of age and not that of a child of tender years but the girl was recalling events which allegedly took place when she was of tender years and unaware, on her admission, as to the nature of the act when it allegedly took place. I am aware of the case of *Tham Kai Yan & Ors v. PP* [1977] 1 MLJ 174 that in the circumstances of that case no need for warnings regarding the uncorroborated sworn evidence of a 14 year old witness. It is obvious, however that in the present case the learned judge rightly exercised her discretion in treating the evidence of this young witness with caution; she had warned herself of the rule of prudence that before an accused can be convicted on the sworn evidence of a child, the sworn evidence must be corroborated by evidence which can reasonably confirm the truthfulness of the child's testimony. She must have had mind *Loo Chuan Huat v. PP* [1971] 2 MLJ 167 at 169 so far as it relates to the sworn

> evidence of a child (insofar as the case deals with the unsworn evidence of a child, the matter is overtaken by section 133A of the Evidence Act 1950 where there is now a requirement in law that the unsworn evidence of any child of tender years has to be corroborated by some other material particular in support implicating an accused before he can be convicted). And it is also quite clear that she warned herself of the desirability for corroboration of the evidence of a prosecutrix in a rape-case (see *Din v. PP* [1964] MLJ 300 at 302) ...
>
> Although PW1 was some 14 years of age when she gave her sworn evidence the learned judge was right in exercising her discretion by requiring corroboration of her evidence that she was raped having regard to the fact that the young girt was recalling events which allegedly took place some 5 years before when she was of tender fears and to the fact that PW1 admitted that she did not know what had taken place.

(e) Normally a child does not have the same temptation to take sides and speak falsehood. But there is a danger in placing absolute reliance upon the evidence of a child witness as it can easily be influenced by adults who have interest in the case. Therefore the evidence of the child witness is to be taken with great caution. Though a child may be a competent witness, a closer scrutiny of its evidence is necessary before the same is accepted by the court. As a matter of strict law, the court can act on the uncorroborated testimony of a single child witness. But it is a sound rule in practice not to act on the uncorroborated evidence of a child. This is only a rule of prudence and not of law. This was the position under s. 118 but under s. 133A EA 1950 corroboration is needed as a matter of law, as it is specifically stated that "unless that evidence is corroborated by some other material evidence in support thereof implicating him."

(f) In this case, there is a total failure on the part of the learned magistrate to comply with provisions of s. 118 as well as s. 133A thereby making the conviction in law unsafe. I do not think such a failure can be cured by the provision of s. 422 of the Criminal Procedure Code which reads as follows:

> Subject to the provisions contained in this Chapter, no finding, sentence or order passed or made by a Court of competent jurisdiction shall be reversed or altered on account of:

(a) any error, omission or irregularity in the complaint, sanction, consent, summons, warrant, charge, judgment or other proceedings before or during trial or in any inquiry or other proceeding under this Code;

(b) the want of any sanction; or

(c) the improper admission or rejection of any evidence,

unless such error, omission, irregularity, want, or improper admission or rejection of evidence has occasioned a failure of justice.

This section has attracted a number of decisions where the courts in similar cases had differed in their views in respect of irregularities. However, on the facts of this case, I take the view that there is a substantial miscarriage of justice as PW3's competency was not established in this case and cannot be patently said that there was some "material evidence" to corroborate the evidence of PW3, as required under s. 133A of EA 1950.

[10] For reasons stated above, I am inclined to agree with the submission of the appellant/accused and allow the appeal of the appellant/accused and dismiss the cross-appeal of the respondent/prosecution. In consequence, I set aside the order of the learned magistrate dated 29 November 2006 on conviction and sentencing. I hereby order so.